IN THE COURT OF APPEALS OF IOWA

No. 0-372 / 10-0509
Filed June 16, 2010

IN THE INTEREST OF S.W. and L.M.,
Minor Children,

STATE OF IOWA,
Appellant,

S.W. and L.M., Minor Children,
Appellants,

B.W., Father of S.W.,
Appellant.

Appeal from the Iowa District Court for Warren County, Kevin Parker, District Associate Judge.

A father appeals the termination of his parental rights to his daughter. Additionally, the State appeals the juvenile court's permanency order placing two children with their maternal grandmother. **AFFIRMED.**

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Bryan Tingle, County Attorney, and Karla J. Fultz, Assistant County Attorney, for appellant State regarding S.W. and L.M.

Yvonne C. Naanep, Des Moines, for appellant father of S.W.

Kathleen T. Sandre, West Des Moines, for appellee mother.

Thomas J. Miller, Attorney General, Kathrine S. Miller-Todd, Assistant Attorney General, Bryan Tingle, County Attorney, and Karla J. Fultz, Assistant County Attorney for appellee State regarding S.W.

Paul L. White of Des Moines Public Defender's Office, Des Moines, for minor children.

Kimberly S. Bartosh of Whitfield & Eddy, P.L.C., Des Moines, for intervenor.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

VAITHESWARAN, P.J.

A father appeals the termination of his parental rights to his daughter. Additionally, the State appeals the juvenile court's permanency order placing two children with their maternal grandmother.

I. Background Facts and Proceedings

Shannon has two children, born in 2001 and 2006. Brian is the father of the older child.

In 2004, the Department of Human Services sought the removal of Shannon's first child based on domestic violence and substance abuse in Shannon's home. The child was placed with Shannon's mother, Ruth, and Ruth's husband, Joel, for approximately nine months. The child was reunited with Shannon in 2005.

By October 2008, Shannon had two children. Both were removed from her care based on her substance abuse. The children were placed with Ruth. Shortly thereafter, Ruth informed the department that Joel had an altercation with his sister that resulted in the filing of criminal charges against him. The department obtained an order transferring the children to foster care. Over the next several months, Ruth and Joel exercised supervised and semi-supervised visits with the children. For a period of time, they were not allowed to have any visits with the children based on the department's perception that the older child was acting out after the visits.

Meanwhile, Shannon continued to abuse alcohol. She was arrested for operating a motor vehicle while intoxicated and underwent outpatient and inpatient treatment. The day she was released from inpatient treatment, she

began drinking again. She was jailed for violating the terms of her probation. At the time of the termination hearing, she was serving time for an operating-while-intoxicated conviction and did not expect to be released until August 2010.

The State petitioned for the termination of Shannon's and Brian's parental rights as well as the parental rights of the younger child's father. Following an evidentiary hearing, the juvenile court granted the petition. In a permanency ruling issued on the same date, the court ordered the placement of the children with Ruth and Joel. Brian appealed the termination ruling, and the State appealed the permanency ruling.

II. Father's Appeal

Brian argues (1) that the record lacks clear and convincing evidence to support the grounds for termination cited by the juvenile court and (2) that termination was not in the best interests of the child**.** *See* Iowa Code § 232.116(1)(d), (e), (*l*) (2009).

On the first issue, the record establishes that Brian did not maintain significant and meaningful contact with his daughter in the months preceding the termination hearing. *Id.* § 232.116(1)(e) (requiring several elements for termination, including "clear and convincing evidence that the parents have not maintained significant and meaningful contact with the child during the previous six consecutive months and have made no reasonable efforts to resume care of the child despite being given the opportunity to do so"). For example, in 2009, his attendance at visits was sporadic. While Brian maintained his employment as a seasonal construction worker prevented him from attending some of the scheduled visits, the record reveals that he did not adequately communicate with

the department about rescheduling the visits. Additionally, in the middle of that year, he was arrested for violating his probation on a conviction for operating a motor vehicle while intoxicated (third) and he was placed at the Newton Correctional Facility. When he was released in October 2009, Brian had telephone contact with his daughter but no in-person visits with her after November 2009. Based on this record, we conclude the State proved that termination was warranted under Iowa Code section 232.116(1)(e). *See In re S.R.*, 600 N.W.2d 63, 64 (Iowa Ct. App. 1999) (stating that the appellate court may affirm a termination of parental rights ruling if any of the sections cited by the juvenile court are satisfied).

On the second question of what was in the child's best interests, we are guided by Iowa Code sections 232.116(2) and (3) and by the Iowa Supreme Court's pronouncements in *In re P.L.,* 778 N.W.2d 33, 37–38 (Iowa 2010). Although Brian testified that he was in a position to have his daughter returned to him, he acknowledged a preference to see the children placed with their maternal grandmother. There was also evidence that the child was experiencing trauma as a result of her father's failure to follow through with visits. Brian had several years to establish his commitment to his daughter and to solidify the bond he shared with her. His repeated failures over the years militate in favor of denying his request for six additional months to move toward reunification, notwithstanding the child's placement with a relative. We affirm the termination of Brian's parental rights to his daughter.

III. State's Appeal

The State takes issue with the juvenile court's permanency order placing the children with Ruth and Joel. The State argues that

> the juvenile court erred in placing [the children] with [the maternal grandmother], whose visits with [the older child] have resulted in her emotional distress and deteriorating behavior, instead of leaving the girls in their pre-adoptive home where [the older child] has obtained a much-needed sense of safety and security over the past 18 months.

The State specifically maintains that the juvenile court "committed error when it refused to mention, much less discuss, the critical testimony and report of [the older child's] therapist."

The State is correct that the juvenile court did not specifically discuss the therapist's opinions and, in particular, her opinion that the children should not be placed with Ruth and Joel. However, the court made detailed findings in its simultaneously-filed termination ruling that reflect a rejection of those opinions.

Whereas the therapist testified that the older child's behavioral issues coincided with her visits with Ruth and Joel, the juvenile court found that the child's behaviors coincided with phone calls initiated by her father and *the absence of* visits with her grandparents. On cross-examination, the therapist acknowledged that she would have no way of knowing what precisely triggered the older child's trauma.[1] Neither she nor any other State witness presented

[1] The State also called the older child's first grade teacher who, like the therapist, found a correlation between the child's increased disciplinary notes and the onset of semi-supervised visits between the child and her maternal grandmother. However, she was unaware of when the semi-supervised visits occurred, received all of her information from the foster mother, and admitted she could not rule out other factors that might have triggered the increased behavior reports. Notably, she did not know the names of the maternal grandparents and had no interaction with them.

evidence that the younger child showed negative behaviors as a result of the visits or otherwise.

The juvenile court's findings also reveal that the court favored the testimony of the service provider who supervised visits with Ruth and Joel. Contrary to the therapist's opinions, this professional opined that the children were "very comfortable with their grandparents," nothing about the interaction gave her pause, and the visits were going very well. She stated that removing the grandparents from the children's lives "would be devastating to them." She even recommended a move to semi-supervised visits, a move that was opposed by Ruth because she believed the department would use her unsupervised actions against her in her bid to obtain custody of the children.

We recognize that the therapist reported several negative statements about Ruth that the older child made to her.[2] However, the therapist did not observe any interactions between the child and her grandmother and acknowledged that the child's negative behaviors could have been triggered by the curtailing of those visits. Most importantly, the therapist conceded that, in 2009, she framed her opinions based on the department's recommendations, and, in her view, the department "was very clearly stating that they did not think the [grandparents] were a viable placement." She stated that, based on the department's recommendation, her opinion "was if they're not a viable placement then the visits are not productive."

[2] Among them was a statement concerning a physical altercation between her grandmother and mother. The grandmother admitted that this occurred in May or June of 2008. She explained that the altercation was precipitated by her daughter's drinking and the grandmother's efforts to protect herself and her grandchildren.

In sum, it is clear that the juvenile court did not cite the therapist's opinions because the court found them unpersuasive. This was the court's prerogative. *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996) ("The trier of fact—here, the district court—has the prerogative to determine which evidence is entitled to belief."). Therefore, we decline to reverse the placement decision on this basis.

In reaching this conclusion, we have also considered other facts cited by the State in support of reversal. Those facts are overstated or irrelevant.

First, the State makes reference to trauma in Ruth's childhood and early adult years. That trauma occurred decades before the termination hearing. At the time of the hearing, Ruth was fifty years old and had appropriately cared for her grandchildren following two placements by the department. When those placements were made, the department expressed no concern that her traumatic childhood adversely affected her ability to care for the children.

Second, the State asserts that Ruth, like her daughter, abused alcohol. Ruth acknowledged that she was convicted of operating a motor vehicle while intoxicated in 1994, sixteen years before the termination hearing. She also conceded that she might have consumed alcohol to excess in the 1990s. She testified that, after that period, she once had a few beers with her daughter at a karaoke bar and she occasionally had a few beers in her home, primarily with company. Notably, she and her husband voluntarily underwent substance abuse evaluations. The evaluator found no substance abuse issues and the department did not provide contradictory reports. Finally, Ruth testified that she

would be willing to discontinue the consumption of all alcohol in light of the department's concerns.

Third, the State cites the criminal charge that was filed against Joel shortly after the 2008 placement. As indicated, the grandmother was the person who reported the charge to the department. The children were not present when the incident occurred. Joel eventually pleaded guilty to a reduced charge and was offered a deferred judgment. The department social worker assigned to the case admitted that by the time of the termination hearing a no-contact order between Joel and his sister had expired, a deferred judgment had been entered, and the conviction had been expunged. Accordingly, this charge is irrelevant to the placement decision.

Finally, the State suggests that placement of the children with Ruth and Joel is inappropriate because they are caring for "their adopted teenage son Rocky, who, like [the older child], has significant emotional and behavioral problems." Significantly, the children's foster parents were caring for four children in addition to Shannon's two children and all four were undergoing therapy. Additionally, the visitation supervisor stated that Rocky was "very loving" with the children and she had no reason to believe he would endanger with them.

After a thorough review of the record, we are convinced that the juvenile court acted appropriately in placing the children with their maternal grandmother. Accordingly, we affirm the placement decision.

AFFIRMED.